IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 15, 2004

STATE OF TENNESSEE v. JAMES F. MONK

Appeal from the Criminal Court for Sullivan County
No. S46,700 Phyllis H. Miller, Judge

No. E2003-02241-CCA-R3-CD - Filed July 12, 2004

A Sullivan County Criminal Court jury convicted the defendant of driving under the influence (DUI), fourth offense, and the trial court sentenced him as a Range II, multiple offender to four years in the Department of Correction and ordered him to pay a $3,000 fine. The defendant appeals, claiming (1) that the evidence is insufficient to support his conviction and (2) that the trial court improperly applied enhancement factors (11) and (17) in T.C.A. § 40-35-114 and denied his request for alternative sentencing. Although we conclude that the trial court should not have applied factor (17), we affirm the judgment of conviction.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Julie A. Rice, Knoxville, Tennessee (on appeal), and Stephen M. Wallace, District Public Defender, and Richard A. Tate, Assistant Public Defender (at trial), for the appellant, James F. Monk.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and William B. Harper, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the defendant's being stopped for riding a dirt bike without a helmet on May 13, 2002. Officer Brian Carter of the Kingsport Police Department testified that about 11:30 a.m. on May 13, he was on patrol and driving on Dale Street. He said he stopped at the intersection with Wilcox Drive and looked to his left, which was north. He said that as he was waiting for traffic to clear, he saw the defendant traveling toward him, southbound on Wilcox Drive. He said that the defendant was riding a Honda XR 70 R dirt bike, that he was not wearing a helmet, and that the dirt bike did not have a headlight. He said that Wilcox Drive was a four-lane road and that the defendant was in the outside lane closest to the curb. He said that the defendant was traveling about twenty

to twenty-five miles per hour and that traffic was passing the defendant. He said that as he watched the defendant, the defendant veered off the road and "kind of bounced the back tire." He said that the bike's front tire bounced onto the curb and that the bike went onto the sidewalk. He said the defendant put the kickstand down, got off the bike, and started walking north. He said he pulled in behind the defendant and asked him for identification. He said the defendant gave him a passport, saying he did not have a driver's license. He said the defendant was unsteady on his feet, had slurred speech, and smelled like beer. He said the defendant admitted drinking two beers that morning and had unopened beer cans in his right and left pants pockets.

Officer Carter testified that he gave the defendant the walk and turn test, the one-leg stand test, and the finger count test. He said that he explained and demonstrated the field sobriety tests and that the defendant performed them poorly. He said he arrested the defendant for DUI and took him to jail. He said that the defendant signed an implied consent form, that he gave the defendant a breathalyzer test, and that the defendant's blood alcohol content (BAC) was .11%.

On cross-examination, Officer Carter acknowledged that when he first saw the defendant, the defendant was about the distance of three football fields away from him. He said the defendant was sitting on the bike, was traveling in the same direction as southbound traffic, and had his feet on the bike's footpegs. He said the defendant told him that the defendant had come from Park Drive and that the bike belonged to some neighborhood kids who lived on Park Drive. He said that the defendant did not try to run from him and that the defendant told him the defendant was taking medication. He denied that the defendant told him the defendant had pushed the bike to a nearby gas station or that the defendant told him the bike's engine would not start. He acknowledged that he assumed the bike was operable, that he did not check the bike's engine to feel if it was warm, and that he never heard the bike's engine running.

David Hickson testified that he worked for Jim's Motorcycle Sales in Johnson City and that he sold the defendant's father a Honda dirt bike about May 7, 2002. He said that he originally bought the bike for his nine-year-old son, that the bike was small, and that the bike's seat was only twenty-four to twenty-eight inches off the ground. He said that he owned the bike for one and one-half years and that the bike sat unused for a long time before he sold it to the defendant's father. He said that when dirt bikes sit for long periods of time without being cranked, gas in the carburetor can go stale and the bike's engine will not start. He said that the bike in this case would not start and that he told the defendant's father it was inoperable. He said the defendant's father bought the bike anyway and used a truck to take the bike away. He said that after the police arrested the defendant, the defendant's father telephoned him and told him what had happened to the defendant. He said that one or two weeks later, he inspected the bike and tried to start it but that the bike would not crank. He said that the bike had about five horsepower and had a top speed of twenty to twenty-five miles per hour. On cross-examination, he acknowledged that he did not see the dirt bike on May 13, 2002, and that he did not know if the bike's engine was operating that day. He also acknowledged having a 1996 conviction for introducing contraband into a penal institution.

James Monk, Sr., the defendant's father, testified that he bought the dirt bike for his grandchildren a day or two before the police stopped the defendant. He said that the bike's engine would not start and that he took the bike to the defendant's mother's house. He said that after the police arrested the defendant, he picked up the bike at Eddie Williams' Wrecker Service. He said that he tried to crank the bike but that the bike's engine would not start. He said that on the day of the defendant's arrest, the sidewalks on Wilcox Drive were being replaced. On cross-examination, he acknowledged that he was not with the defendant on May 13, 2002.

The defendant testified that he was thirty-five years old, divorced, and had a son. He said that he was in a bicycle accident five years before the trial and that he suffered a head injury. He said that as a result of the accident, he was disabled, had poor balance, could not stand on one foot, and could not ride a bicycle or a dirt bike. He said that on May 13, he was at his mother's house and saw the bike. He said he thought the bike belonged to David Hickson, who lived on Park Drive, and that he did not know his father had bought the bike. He said that the bike's engine would not start and that he thought some children might have put two-cycle oil in it. He said he decided to push the bike to a gas station on Wilcox Drive, which was about one and one-half blocks from his mother's house. He said that it was a hot day, that he had to stop and take breaks while he was pushing the bike, and that it took him about twenty minutes to push the bike to the gas station. He said that when he got to the station, he drained the old gas out of the bike and tried to crank it but that the bike's engine would not start. He said that he decided to try to crank the bike while pushing it and that he began running with the bike between his legs. He said that he was on the sidewalk and that his hands were on the bike's handlebars. He said that a construction crew was working on the sidewalk and that he had to move the bike into the street in order to go around the construction. He said that as soon as he cleared the construction, he moved the bike back to the sidewalk. He said that the bike still would not start, that he was frustrated, and that he got off the bike. He said that as he was walking away from the bike, a police officer approached him and asked him for identification.

The defendant testified that he told the officer he needed to get the bike to his father's house, which was about five miles away. He said that he could not ride the bike to his father's house because the bike was inoperable and that he told the officer he had not been riding the bike. He said he also told the officer that he had a head injury, that he had been drinking alcohol, and that he could not take a breathalyzer test or balance on one leg. He said the officer would not listen and just wanted to take him to jail. He acknowledged having unopened beer cans in his pants pockets and said that he had brought the beer with him because it was a hot day and he had to push the bike a long way. Although the defendant originally had been charged with violating the vehicle registration law, violating the vehicle insurance law, violating the helmet law, violating a motor vehicle habitual offender order, and DUI, fourth offense, the trial court dismissed the first two charges and the jury convicted the defendant only of DUI, fourth offense, a Class E felony.

I. SUFFICIENCY OF THE EVIDENCE

The defendant claims that the evidence is insufficient to support his DUI conviction because the state failed to prove that the dirt bike was a "motor driven vehicle" as required by the DUI

statute. He argues that because the bike was inoperable, it was incapable of being self-propelled and was essentially a bicycle, which excludes it from the definition of a "motor driven vehicle." See T.C.A. § 55-8-101(31). The state claims that the evidence is sufficient because Officer Carter testified that the defendant was driving the dirt bike on Wilcox Drive. We agree that the evidence is sufficient.

Our standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

Tennessee Code Annotated § 55-10-401(a)(1) makes it unlawful "for any person to drive or to be in physical control of any . . . motor driven vehicle on any of the public roads and highways of the state . . . while . . . [u]nder the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system." A "motor vehicle" is defined as "every vehicle . . . that is self-propelled excluding motorized bicycles and every vehicle . . . that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails." T.C.A. § 55-8-101(31).

Taken in the light most favorable to the state, the evidence is sufficient to support the defendant's DUI conviction. Officer Carter testified that he saw the defendant riding the dirt bike on Wilcox drive, that the defendant's feet were on the footpegs, and that the dirt bike was traveling twenty to twenty-five miles per hour. Although Officer Carter did not check the bike's engine to see if it was warm and did not hear the engine running, he testified that the defendant never told him that the bike was inoperable. The officer also testified that the defendant admitted drinking alcohol, smelled like beer, had slurred speech, did poorly on field sobriety tests, and had a BAC of .11%. While two witnesses testified that the dirt bike had been inoperable before and after the defendant's arrest, neither witness was present when Officer Carter saw the defendant riding the bike. Based on the police officer's testimony, we conclude that a rational jury could have found that the bike's engine was operating while the defendant was riding it on May 13, 2002, and that the defendant was driving the bike on Wilcox Drive while under the influence.

II. SENTENCING

The defendant claims that the trial court improperly applied enhancement factors to his sentence and improperly refused to grant his request for an alternative sentence. The state acknowledges that the trial court improperly applied one enhancement factor but contends that the defendant's four-year sentence is proper. We conclude that the trial court improperly applied an

enhancement factor in this case but that the trial court properly ordered the defendant to serve a four-year sentence in confinement.

No witnesses testified at the defendant's sentencing hearing, but the state introduced his presentence report into evidence. According to the report, the defendant completed the eleventh grade and never obtained his GED. In the report, the defendant stated that his health was good but that a 1998 bicycle accident had resulted in his having a cracked skull and a titanium rod in his right arm. The defendant also stated that his mental health was good but that he was depressed because he had stopped taking his usual medication since being in jail. The defendant also stated that he was under a doctor's care for bipolar manic depressive disorder from 1995-2000 and that he currently was taking Neurotin, Klonepin, and Valium. The defendant also said that he started using alcohol when he was eight years old and that he had used marijuana and cocaine. Although the defendant stated that he was an alcoholic and that he and his wife had divorced in 1999 due to his alcoholism, he said that he had never received treatment for his addiction. The report shows that the defendant receives social security insurance benefits due to his bicycle accident and that the defendant worked for his father's furniture business from 1987 to 1998. The report shows that the defendant has a prior felony conviction for selling cocaine, a felony conviction for driving while a motor vehicle habitual offender, three misdemeanor convictions for possessing drug paraphernalia, three misdemeanor convictions for DUI, two misdemeanor convictions for illegal drug possession, one conviction for driving on a revoked license, and has been declared a motor vehicle habitual offender. The report also shows that the defendant has had prior probation and community corrections sentences revoked.

The trial court classified the defendant as a Range II, multiple offender and noted that he was facing two to four years in confinement for a Class E felony. See T.C.A. § 40-35-112(b)(5). The trial court applied enhancement factors (2), that the "defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range"; (9), that the defendant has a previous history of not complying with the conditions of a sentence involving release into the community; (11), that the defendant "had no hesitation about committing a crime when the risk to human life was high"; and (17), that the defendant committed the crime under circumstances in which the potential for bodily injury to a victim was great. See T.C.A. § 40-35-114(2), (9), (11), (17). The trial court gave great weight to enhancement factors (2) and (9) and some weight to factors (11) and (17). See T.C.A. § 40-35-113. It applied no mitigating factors and enhanced the defendant's sentence to four years. Regarding alternative sentencing, the trial court noted that as a Range II, multiple offender, the defendant was not entitled to the presumption that he was a favorable candidate for alternative sentencing. See T.C.A. § 40-35-102(6). It also noted that the defendant had a serious problem with alcohol, that his alcoholism had resulted in his having a poor social history, and that he had never sought treatment for his addiction. It ruled that he had no chance for rehabilitation and denied his request for alternative sentencing.

When a defendant appeals the length, range, or manner of service of a sentence imposed by the trial court, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). The presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing

principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d), Sentencing Commission Comments. However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the sentence is purely de novo. Ashby, 823 S.W.2d at 169.

The defendant was sentenced as a Range II, multiple offender, for which the applicable range for a Class E felony is two to four years. T.C.A. § 40-35-112(b)(5). The presumptive sentence for a Class E felony is the minimum in the range when no enhancement or mitigating factors are present. T.C.A. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and then reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Ashby, 823 S.W.2d at 169.

When determining if incarceration is appropriate, a trial court should consider whether (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. Ashby, 823 S.W.2d at 169 (citing T.C.A. § 40-35-103(1)(A)(C)). The trial court may also consider the mitigating and enhancing factors set forth in T.C.A. §§ 40-35-113 and -114. T.C.A. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). In addition, a trial court should consider a defendant's potential or lack of potential for rehabilitation. T.C.A. § 40-35-103(5); Boston, 938 S.W.2d at 438.

The defendant claims that the trial court improperly applied enhancement factors (11) and (17). The state agrees that the trial court improperly applied factor (11) and does not address enhancement factor (17). Regarding the application of enhancement factor (11), that the defendant had no hesitation about committing a crime when the risk to human life was high, the trial court stated,

> So when you're on a public road and you're intoxicated, you're under the influence, and you're on a motor vehicle you do endanger other people's lives. I mean like I said, just, you know, the first thought is, well what's going to happen. Well, you're going to veer out into traffic and they're going to run over you and kill you, you know, so only your life is in danger. But no, people tend to try to keep from running over people, so then they swerve around and then they hit other people and you were on a, you know, I believe it's a four-lane highway, heavily traveled. As I recall it was raining, I believe my notes show that, so I find that applies.

Without explanation, the trial court also applied enhancement factor (17), that the potential for bodily injury to a victim was great.

We conclude that the trial court properly applied enhancement factor (11). Enhancement factor (11) may be applied when the defendant creates a high risk to the life of a person other than the named victim. State v. Bingham, 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995). This court has stated that in order for this factor to apply in a DUI case, "proof that other persons or motorists were either in the vicinity or placed at risk by Defendant's conduct" must exist. State v. Janice Carol Biskner, No. E2000-01440-CCA-R3-CD, Hamilton County, slip op. at 13 (Tenn. Crim. App. Nov. 13, 2001). Officer Carter testified that the defendant was riding the dirt bike on the roadway, that the defendant was traveling with the traffic, and that traffic was passing the defendant. We believe his testimony demonstrates that other motorists were in the defendant's vicinity and that the trial court properly applied enhancement factor (11). Regarding enhancement factor (17), though, we conclude that this factor was inapplicable. Our supreme court has stated that unlike enhancement factor (11), "[t]here is nothing in the statutory language of [this] enhancement factor to indicate that it applies to potential victims or that it applies simply because the offense was committed in the presence of other individuals." State v. Imfeld, 70 S.W.3d 698, 706 (Tenn. 2002). In State v. Brenda F. Jones, No. W2002-00751-CCA-R3-CD, Madison County, slip op. at 6 (Tenn. Crim. App. July 29, 2003), this court stated that factor (17) "can only be applied in cases involving crimes with a specific victim" and ruled that the trial court could not use factor (17) to enhance the defendant's DUI sentence because DUI is a crime that lacks a named victim.

Nevertheless, given that three enhancement factors are applicable and that two of the factors are entitled to great weight because the defendant has an extensive criminal history and has violated probation and community corrections sentences before, we conclude that a four-year sentence is appropriate in this case. Regarding the defendant's request for alternative sentencing, the record reflects that despite the fact that the defendant's alcohol addiction has resulted in three prior DUIs and the breakup of his marriage, he has never sought treatment. We agree with the trial court that the defendant has little potential for rehabilitation and that he should serve his sentences in confinement.

Based upon the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, JUDGE